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458161—42

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1126

HERMAN E. HEFLIN AND EDWARD HUELL HEFLIN,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the circuit court of appeals (R. 27–28) is reported in 125 F. (2d) 700.

### JURISDICTION

The judgment of the circuit court of appeals was entered February 9, 1942 (R. 28), and the petition for rehearing (R. 29–32) was denied March 10, 1942 (R. 33). The petition for a writ of certiorari was filed April 8, 1942. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

### QUESTION PRESENTED

Whether the trial judge's short absence from the courtroom while petitioners' counsel was making his final argument to the jury constituted a deprivation of a trial by jury.[1]

### STATEMENT

Petitioners were convicted on April 17, 1941 (R. 1–2), in the United States District Court for the Southern District of Florida upon an indictment charging that they conspired to violate the internal revenue laws relating to liquor and were sentenced to imprisonment for a term of eleven months and fifteen days (R. 22–24).

During the final argument to the jury by one of the attorneys for the petitioners, the trial judge left the courtroom for two or three minutes to go to the lavatory, returning before the argument was completed (R. 1–2, 6, 11–12, 13, 15). The lavatory was off an anteroom connecting with the courtroom, and, during the period of the judge's absence, the door between the courtroom and the anteroom and the door between the anteroom and

[1] This question was first raised on motion for a new trial and, hence, would seem not to be reviewable. *Bucklin* v. *United States*, 159 U. S. 682, 685. However, since the circuit court of appeals considered the question, we discuss it.

the lavatory were closed (R. 13). Petitioners' counsel noticed that the judge was gone, but did not object, and proceeded with his argument (R. 2, 8, 12). There was no commotion or interruption of the argument (R. 6, 7, 15) and no question for ruling or determination by the judge arose during his absence (R. 7, 12). Upon the judge's return, petitioners' counsel did not refer to the judge's absence, make any objection, or take any exception (R. 2, 12). Nothing was said about the incident by either defense or Government counsel (R. 10, 15). After the trial, however, petitioners moved for a new trial upon this ground (R. 2), a hearing was held (R. 2–13), and the motion was denied (R. 13).

## ARGUMENT

Petitioners' sole contention (Pet. 3–4) is that the right to trial by jury guaranteed by the Sixth Amendment includes the presence of a judge during the entire trial, and that the judge, by leaving the courtroom for two or three minutes while petitioners' counsel was engaged in his final argument to the jury, deprived them of their constitutional right. It is true that trial by jury "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts * * *." *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13–14; *Patton* v. *United States,* 281 U. S. 276, 288. But, realistically viewed, it is clear that

these requisites of a jury trial were not vitiated by the short absence of the judge in the present case. His ability to instruct the jury on the law and to advise them on the facts was not impaired by his failure to hear a part of the argument of petitioners' counsel which was directed toward the jury, and no question arose during his absence which required his determination. To hold in such circumstances that petitioners were denied a jury trial would be to ignore the fact that "the Constitution is concerned, not with form, but with substance." *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498; *Walker* v. *Southern Pacific Railroad*, 165 U. S. 593, 596.[2]

Petitioners do not argue that the convictions were unsupported by the evidence or that they

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[2] In *Slaughter* v. *United States*, 5 Ind. T. 234; *Ellerbe* v. *State*, 75 Miss. 522 (1897), and *Thompson* v. *The People*, 144 Ill. 378 (1893), cited by petitioners (Pet. 4–5, 6), objections were made to the argument to the jury on which the judge was unable to rule due to his absence. In *People* v. *Blackman*, 127 Cal. 248 (1899) (Pet. 6), the judge was absent while the prosecuting attorney was arguing to the jury. The opportunities for prejudice in such a case are apparent. In *The State* v. *Beuerman*, 59 Kan. 586 (1898), referred to by petitioners (Pet. 7), the court reversed for other errors during the course of the trial and refused to rule on the effect of the judge's absence (59 Kan., at 592). Where no prejudice accompanied the judge's action, the state courts have refused to reverse, contenting themselves with pointing out that the better practice is to take a recess. *White* v. *State*, 61 Tex. Cr. R. 498 (1911); *Turbeville* v. *State*, 56 Miss. 793 (1879); *Pritchett* v. *State*, 92 Ga. 65 (1893); *State* v. *Dobry*, 217 Iowa 858 (1933); *Shaffer* v. *State*, 124 Neb. 7 (1932).

were not afforded a fair trial.[3] The judge's absence was at most a technical error which neither prejudiced petitioners nor denied them a substantial right. Accordingly, the circuit court of appeals properly affirmed the convictions (R. 28) under Section 269 of the Judicial Code (28 U. S. C. 391), providing that "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors * * * which do not affect the substantial rights of the parties."

Moreover, even if the absence of the trial judge during argument to the jury should be regarded as a deprivation of a constitutional right, petitioners now have no standing to argue the issue. Constitutional guarantees may be waived, and petitioners' failure to object or even comment upon the judge's absence until after the trial must be deemed such a waiver. Cf. *Buckner* v. *Hudspeth,*

[3] However, they do argue (Pet. 7) that the judge, by leaving the courtroom during counsel's argument to the jury, may have caused the jury to believe that that argument had little importance or merit. The answer to this contention is that if counsel had called the court's attention to the possibility of prejudice, the alleged reflection upon counsel's argument could have been dissipated by an instruction to the jury that no such reflection was intended. As this Court has said, "We must guard against the magnification on appeal of instances which were of little importance in their setting" (*Glasser* v. *United States*, Nos. 30, 31, and 32, present Term, decided January 19, 1942).

105 F. (2d) 396, 397 (C. C. A. 10), certiorari denied, 308 U. S. 553; *Pietch* v. *United States,* 110 F. (2d) 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Hagner* v. *United States,* 285 U. S. 427, 433.[4]

CONCLUSION

The case was correctly decided below, there is no question of general importance, and there is involved no conflict of decisions warranting certiorari. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
*Solicitor General.*

WENDELL BERGE,
*Assistant Attorney General.*

OSCAR A. PROVOST,
HAROLD F. REIS,
*Attorneys.*

MAY 1942.

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[4] *Freeman* v. *United States*, 227 Fed. 732, 759 (C. C. A. 2), upon which petitioners rely (Pet. 5–6), does not present a comparable situation. Moreover, as was pointed out in *Simons* v. *United States*, 119 F. (2d) 539, 543–544 (C. C. A. 9), certiorari denied, No. 192, this Term, October 13, 1941, the *Freeman* case was predicated upon the premise that none of the aspects of a jury trial may be waived. This premise has been destroyed by the decision of this Court in *Patton* v. *United States*, 281 U. S. 276, 290. See also *Cahill* v. *Mayflower Bus Lines*, 7 F. Supp. 869, 872 (S. D. N. Y.), affirmed, 77 F. (2d) 838, 840 (C. C. A. 2).

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